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No. 09-745

In The
Supreme Court of the United States

DENNIS ANDREWS, TIM KAUFMANN, SAUL WEINSTEIN, NOBERTO BERCASIO, FRED COFFEY, EVAN FERMAINT, RONALD PROHASKA AND EDWARD BYRNE,
Petitioners,

v.

ROGER FAIRLEY AND RICHARD GACKOWSKI,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION[1]

Respondents characterize the Seventh Circuit opinion underlying this Petition as "unremarkable" – re-casting the holding as a narrow one implicating First Amendment protection for "truthful testimony." Were it so, the opinion would still be remarkable to the extent it makes actionable – under the First Amendment – harassment alleged to have been directed at "discouraging" *future* "truthful testimony" (as opposed to "retaliating" against someone for their past "truthful testimony").

But the Seventh Circuit opinion is – explicitly – neither limited to trial testimony, nor to "truthful testimony." It is, instead, cast much more broadly, holding that "[t]he first amendment protects speakers from threats of punishment that are designed to discourage *future speech*." *Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009) (emphasis added). And holds further that the Respondents may "recover from any defendants" who made such "threats of punishment." Id.

Notwithstanding Respondents' contention that this holding is "obvious" "unremarkable," and putatively "based in well-established law" they have failed to cite a single case – from this Court or any other – that stands for remotely the same propositions.

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[1] Respondents' Brief in Opposition includes a "Statement of the Case," recounting, in some detail, the supposed misconduct that was the eventual subject of the Respondents' trial testimony. The "Statement" omits the fact that a Cook County jury rendered a defense verdict necessarily rejecting the Respondents' testimony (See Sec III(B), infra).

The Petition should be granted. The decision below is unprecedented in the most literal sense -- importing the doctrine of "prior restraint" into claims for "First Amendment retaliation" -- and thus deciding an important question of law that should be addressed by this Court. Moreover – notwithstanding Respondents' contention to the contrary – the basis of the opinion does evidence a circuit split in need of this Court's resolution. Either ground is sufficient to justify the grant of the Petition under Supreme Court Rule 10(a).

I. None of the Cases Cited by the Respondents Supports the Contention that the Opinion is "Obvious, Unremarkable" and "Based on Well-Established Law"

Respondents contend that "[a]lthough prior restraint cases tend to arise in the context of formal 'legal impediments' such as gag orders or written policies, there is no requirement for such in order to state a viable First Amendment violation." (Brief in Opposition at pp 7). Requiring Respondents to fit their claim of a "First Amendment violation" into the elements established for a claim of "prior restraint" is, according to the Brief in Opposition, an "exaltation of form over substance" that is "wrong as a matter of law." Id.

Respondents attempt to shun the categorization of their claim as involving a "prior restraint" in favor of something they would prefer to be termed a "First Amendment violation" is improper. They cannot now treat the relevant issue as anything *other than* one involving the doctrine of prior restraint for at least two reasons. First, they *invited* the Seventh Circuit opinion reversing summary judgment in favor of the

defendants "to the extent that [the district court] dismissed the prior restraint claim" (*Fairley v. Andrews*, 578 F.3d 518, 526 (7th Cir. 2009)), And second, since the Petition for Certiorari was docketed, the Respondents have sought and obtained leave to file a Third Amended Complaint in which the only substantive cause of action is now *captioned* "Count I: Deprivation of First Amendment Rights Under § 1983 (PRIOR RESTRAINT)" (Appendix at 1a – 26a).

For one or both of those reasons, Respondents are judicially estopped from arguing that the issue is anything other than one directly involving a claim of prior restraint. See e.g. *State of New Hampshire v. State of Maine*, 532 U.S. 742, 749 (2001).

Respondents' attempt to re-characterize their claim would seem to be a transparent effort to avoid this Court's holding in *Alexander v. United States*, 509 U.S. 544 (1993), which runs directly counter to the position they espouse in the Brief in Opposition and requires the subject government action impose a formal "legal impediment . . . on petitioner's ability to engage in expressive activity" or require him "to obtain prior approval for any expressive activities" in order to rise to an unconstitutional prior restraint. *Alexander*, 509 U.S. at 550. Respondents distinguish *Alexander* on its facts, as involving a "wholly inapposite forfeiture order" (Brief in Opposition at pp 10) and instead argue that this Court has approved "look[ing] through form to substance" in a general sense that would apparently forgive them from establishing the elements of a recognized First Amendment claim.

Respondents cite *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) – for the explicit proposition that

"informal censorship" can rise to an unconstitutional level and the implicit proposition that the doctrine of "prior restraint" is, thus, not confined in application to formalized restrictions on speech.

Bantam Books involved a creature of the Rhode Island state legislature designated the "Rhode Island Commission to Encourage Morality in Youth." The Commission took it upon itself to send notices to book distributors stating that it had been charged with "prevent[ing] the sale, distribution or display of indecent and obscene publications" and that lists of "objectionable" publications were being circulated to local Chiefs of Police with the order that "they are not to be sold, distributed or displayed to youths under the eighteen years of age." 372 U.S. at 63 n. 5.

Justice Brennan, writing for the majority, found that the notices were "phrased virtually as orders," and that the "blacklists" of publications "*plainly serve as instruments of regulation* independent of the laws against obscenity." Id. at 68 (emphasis added). The Court further found that the Commission's operation was itself "*a form of effective state regulation* superimposed upon the State's criminal regulation of obscenity," (Id. at 69) (emphasis added) terming it a "system of prior administrative restraints" (Id. at 70) and a "system of informal censorship." Id. at 71.

Given the context, "informal," as used in *Bantam Books*, means nothing more than "extra-legislative." The "informal censorship" referenced by the Court was a "*system* of informal censorship" that the Court expressly found to have been the functional equivalent of state regulation. *Bantam Books* cannot be said to support the proposition that Respondents forward as

"well-established": that "look[ing] through the form to the substance" permits *any* "informal" state action that could affect constitutionally-protected speech to be potentially treated as unconstitutional.

The only other Supreme Court case that Respondents cite as support for their claim that the opinion below is "based on well-established law" is *Baird v. State of Arizona*, 401 U.S. 1 (1971). *Baird* concerned the constitutionality of an Arizona Bar Committee question requiring applicants to "state whether [they] had ever been a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence." *Baird*, 401 U.S. at 4-5. The Court held that inclusion of the question violated the First Amendment right of freedom of association. Id. at 7.

The Court did not address the doctrine of prior restraint directly or indirectly in *Baird*. And Respondents have not attempted to characterize their claim as involving one impacting freedom of association.

None of *Ridpath v. Board of Governors*, 447 F.3d 292 (4th Cir. 2006); *Edwards v. City of Goldsboro*, 178 F.3d 231, 246 (4th Cir. 1999), or *Aebisher v. Ryan*, 622 F.2d 651 (2nd Cir.1980), so much as address the issue of prior restraint. And neither do the two remaining cases cited by the Respondents support the position that the opinion is "based on well-established law."

In *Penthouse Int'l, Ltd. v. Mcauliffe*, 610 F.2d 1353 (5th Cir. 1980), the Fifth Circuit found a County Solicitor General's "calculated scheme of warrantless arrests and harassing visits to retailers" selling adult

magazines constituted a "constructive seizure" of the magazines, and, thus, an unconstitutional "informal system of prior restraint" justifying an injunction. 610 F.2d at 1361. And in *Morris v. Lindau*, 196 F.3d 102 (2nd Cir. 1999), the Second Circuit acknowledged that a prior restraint can only legally exist "where the government imposes a requirement of advance approval or seeks to enjoin speech . . ." *Morris v. Lindau*, 196 F.3d at 113 (quoting *Dial Info. Servs. Corp. v. Thornburgh*, 938 F.2d 1535, 1543 (2nd Cir. 1991)).

II. The Opinion Evidences a Circuit Split

Respondents argue that there is "no split in the Courts of Appeal on the legal issue raised in [the] Petition." (Brief in Opposition at pp 1) But the Seventh Circuit opinion arises, at bottom, from the broadest possible view of "First Amendment Retaliation" in the context of a public employment setting. And to the extent the opinion can be read as expanding that "constitutional tort" (instead of creating a new one based in "prior restraint"), it serves to highlight an important circuit split, the resolution of which would be necessary to constrain the growing sprawl of public employment-related federal litigation.

In cases involving a claim of "First Amendment Retaliation" in a public employment context, the Seventh Circuit – as well as the Fourth and Ninth Circuits – require only that the offending conduct rise to the level of that "reasonably likely to deter" First Amendment-protected speech or activity. See e.g. *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982); *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337 (4th Cir. 2000); *Coszalter v. City of Salem*, 320 F.3d 968 (9th

Cir. 2003). By contrast, four other circuits – the First, Fifth, Eighth and Eleventh – require the offending conduct to effect a substantive "adverse employment action" akin to that required by Title VII in order to be actionable. See e.g. *Acosta-Orozco v. Rodriquez-de-Rivera*, 132 F.3d 97, 101 n. 5 (1st Cir. 1997) ("unreasonably inferior" test); *Banks v. East Baton Rouge Parish Sch. Bd.*, 320 F.3d 570, 580 (5th Cir. 2003) ("adverse employment action"); *Meyers v. Starke*, 420 F.3d 738, 744 (8th Cir. 2005) (same); *Stavropoulos v. Firestone*, 361 F.3d 610, 619 (11th Cir. 2004) (action affecting "important condition of employment").

Ultimately, the circuit split turns on the question of justiciability. Under *Bart v. Telford*, and its progeny, the lower boundary of a First Amendment retaliation claim is formed by the doctrine of *de minimis non curat lex* and "actionability under section 1983" is a "question of fact" to be determined by a jury. See *Bart*, 677 F.2d at 625. The countervailing view holds that the court must determine in the first instance whether a First Amendment retaliation plaintiff has a cognizable injury by applying a standard analogous to that required by Title VII.[2]

In the end, the justiciability of a First Amendment retaliation claim should not effectively continue to be a "question of fact" to be decided by a jury – as it has become in the Seventh, Fourth and Ninth Circuits. Justiciability should instead be treated as a threshold

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[2] The circuit split has been the subject of recent commentary. *See* Bohn, Elizabeth J., *Put On Your Coat, A Chill Wind Blows*, 83 Denv. U. L. Rev. 867 (2006), Berger Levinson, Rosalie, *Superimposing Title VII's Adverse Action Requirement on First Amendment Retaliation Claims*, 79 TUL. L. REV. 669, 694 (2005).

question of law to be decided by the court. This Court should resolve the circuit split in favor of the test applied by the First, Fifth, Eighth and Eleventh Circuits.

III. The Respondents' Formulation of the "Question Presented" is Misleading

Respondents have formulated their own "Question Presented" that is misleading in at least two different respects. First, the Respondents' "Question Presented" suggests that the Seventh Circuit found that the alleged "threats of physical violence and battery" were, in fact, made "under color of law." And second, the "Question Presented" implies that there has been some kind of holding that the Respondents' trial testimony was "truthful."

The opinion below did not analyze the whether the claimed harassment occurred "under color of law" and neither predicated its holding on the supposed "truthful" nature of the "future speech" at issue or held that the Respondents' testimony was "truthful" in fact.

A. The Alleged "Harassment" Cannot Be Presumed to Have Occurred "Under Color of Law"

Acting "under 'color' of law means under 'pretense' of law." *Screws v. U.S.*, 325 U.S. 91, 111, 65 S.Ct. 1031, 1040 (1945). And "acts of officers in the ambit of their personal pursuits are plainly excluded." *Screws*, 325 U.S. at 111, 65 S.Ct. at 1040.

Both the Respondents, as well as the Petitioners, were employed in a law enforcement capacity by the

Cook County Department of Corrections. But the fact that the allegations concern actions that occurred while each of the parties were in uniform and on duty has little bearing on a proper analysis of whether the alleged acts occurred "under color of law." "[W]hether a police officer is acting under color of state law turns on the nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of his official duties." *Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir. 1995). "The key determinant is whether the actor, at the time in question, purposes to act in an official capacity or to exercise official responsibilities pursuant to state law." *Id.*

In *Martinez*, a police officer sued various of his fellow officers on Constitutional grounds after one of the defendants accidentally discharged his firearm, maiming him. Entering summary judgment on the constitutional claims, the First Circuit held that the "tormenting an acquaintance" while "reprehensible" was not "action under color or pretense of law" because plaintiff had not produced any evidence tending to show that the plaintiff's tormentor – even when brandishing his gun – was exercising or purporting to exercise police power.

So too the situation giving rise to this Petition. Contrary to the implication in Respondents' formulation of the "Question Presented," it cannot be presumed simply by virtue of the fact that Petitioners were all uniformed officers, that the Respondents were led to believe that they were "acting with the imprimatur of the state." The allegations of harassment at issue here are wholly unrelated to the performance of the defendant officers' duties as state employees. The complained of interactions arise

merely from proximity – not any type of state-conferred powers. By their very nature, they are "private acts" rather than acts taken "under color of state law."

B. Respondents' Trial Testimony Cannot Be Preumed to Have Been "Truthful" Given the Fact that a Twelve-Person Jury Rejected It.

Respondents' claim centers on their trial testimony on behalf of the plaintiffs in *Fields v. Byrne,* No. 00 L 9339 (Cir. Ct. Cook County filed Aug. 16, 2000). But on June 3, 2005, a twelve-person jury entered a verdict in favor of the *defendants* in that case, including Petitioners Lt. Edward Byrne and Correctional Officers Evan Fermaint and Norberto Bercasio, and *against* the plaintiffs, who claimed – consonant with Respondents' testimony -- that they were "beat[en]" by the defendants on July 29, 2000. (Appendix at 27a).

The Seventh Circuit opinion notes that ""[t]he jury returned a defense verdict," (*Fairley*, 578 F.3d at 521), but fails to analyze the obvious impact of that defense verdict on the Respondents' claim. The defense verdict is necessarily fatal to Respondents' claims because – as Respondents implicitly acknowledge – the Constitution can only be said to protect *truthful* trial testimony. This Court's precedent is clear: "There is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). And neither "the knowingly false statement" nor the "false statement made with reckless disregard of the truth" "enjoy constitutional protection" *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

The *Fields* jury could not have credited either Fairley or Gackowski's trial testimony as "truthful" and entered a verdict for the defendants in that case. And Respondents have no First Amendment claim, as a matter of law, arising from allegations related to trial testimony rejected by a jury as incredible.

CONCLUSION

Despite Respondents' contentions to the contrary, the opinion below is remarkable in several respects. The opinion below effectively eliminates the temporal component of "retaliation," permitting public employee/plaintiffs to pursue causes of action for anything they subjectively feel is constraining them from saying something or doing something constitutionally-protected in the future. This formulation places potential defendants in the impossible position of having to know, in advance, what the prospective plaintiffs might desire to say or do in the future so as not to be accused of preventing them from saying or doing it.

Secondly – and entirely apart from the temporal issue – the opinion does not limit the field of potential defendants to the plaintiffs' employers or supervisors. Without analysis, it makes actionable – for the first time – claims of First Amendment-based "harassment" by and between co-equal employees. The decision has the effect of broadening the pool of potential First Amendment retaliation litigants along two different axes. It would both permit public sector employees aggrieved by some act committed by their co-equals to become plaintiffs; and allow non-supervisory public sector employees to be named as defendants. The geometric increase in the number of potential First

Amendment retaliation litigants will inexorably lead to a geometric increase in First Amendment retaliation-based litigation.

The opinion, which stands to affect hundreds of thousands of Seventh-Circuit-based public-sector employees, has the same potential to do for the law of "First Amendment retaliation" what *Monroe v. Pape*, 365 U.S. 167 (1961) did for Section 1983 law, generally – transforming a relatively seldom seen claim into "one that pours into the federal courts tens of thousands of suits each year" and contributes further to the "losing struggle to prevent the Constitution from degenerating into a general tort law." *Crawford-El v.Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting),

For all the reasons set forth herein, the Petitioners respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX 1

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 03 C 5207

[Filed February 22, 2010]

ROGER FAIRLEY and RICHARD GACKOWSKI,

Plaintiffs,

v.

DENNIS ANDREWS; EDWARD BYRNE; EVAN FERMAINT; NORBERTO BERCASIO; FRED COFFEY; RONALD PROHASKA; SAUL WEINSTEIN, in their individual capacities; and THE SHERIFF OF COOK COUNTY, ILLINOIS, and COOK COUNTY, ILLINOIS for indemnification purposes.

Defendants.

Judge Amy St. Eve

THIRD AMENDED COMPLAINT

Nature of the Case

1. This is a case about two individuals who did the right thing. Instead of being commended, they were harassed, threatened, intimidated, and forced out of their jobs. Plaintiffs Roger Fairley and Richard Gackowski have been deprived of their basic civil rights by government officials whose duties include upholding the law and protecting the civil rights of others. Plaintiffs bring this Complaint pursuant to 42 U.S.C. § 1983 to redress violations of their rights under the First and Fourteenth Amendments of the United States Constitution. Plaintiffs, former Cook County correctional officers (guards at the Cook County Jail), repeatedly witnessed, spoke out and opposed numerous inmate beatings, and refused to participate in the wide-spread and accepted practice at the Cook County Jail of allowing and concealing the use of excessive force by correctional officers on inmates. In response, the Defendant correctional officers and others harassed Plaintiffs. In August 2000, several inmates filed a well-publicized lawsuit regarding a series of beatings by correctional officers at the Jail ("the *Fields* litigation"). In an attempt to prevent the Plaintiffs from testifying truthfully in this case about their knowledge of the use of excessive force by correctional officers, Defendants and other correctional officers engaged in concerted action aimed at discouraging Plaintiffs from testifying truthfully in the *Fields* litigation. Defendants' harassment, which culminated in threats of bodily harm against Plaintiffs, was extreme and outrageous. This campaign of harassment seriously injured Plaintiffs and constituted a violation of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

Parties

2. Plaintiff Roger Fairley is a citizen of the United States and a resident of the Northern District of Illinois. From October 31, 1994 to February 4, 2003, Plaintiff Fairley was employed at the Cook County Department of Corrections ("CCDOC") as a correctional officer.

3. Plaintiff Richard Gackowski is a citizen of the United States and a resident of the Northern District of Illinois. From June 12, 1995 to February 4, 2003, Plaintiff Gackowski was employed at the CCDOC as a correctional officer.

4. Since approximately August 2000, and at all times pertinent to the allegations of this complaint, Defendant Dennis Andrews was the Superintendent of Division One. He is sued in his individual capacity for acts under color of law.

5. At all times pertinent to the allegations of this complaint, Defendant Edward Byrne was a correctional officer holding the rank of Lieutenant with the CCDOC. He is sued in his individual capacity for acts under color of law.

6. At all times pertinent to the allegations of this complaint, Defendant Evan Fermaint was a correctional officer with the CCDOC. He is sued in his individual capacity for acts under color of law.

7. At all times pertinent to the allegations of this complaint, Defendant Norberto Bercasio was a correctional officer with the CCDOC. He is sued in his individual capacity for acts under color of law.

8. At all times pertinent to the allegations of this complaint, Defendant Fred Coffey was a correctional officer with the CCDOC. He is sued in his individual capacity for acts under color of law.

9. At all times pertinent to the allegations of this complaint, Defendant Ronald Prohaska was a correctional officer with the CCDOC. He is sued in his individual capacity for acts under color of law.

10. Defendant Saul Weinstein was the Chief Investigator of the Internal Affairs Division ("IAD") from at least May 2001 until late 2002. He is sued in his individual capacity for acts under color of law.

11. Defendant Sheriff of Cook County, Illinois has entered into a binding stipulation that he will pay from public funds any and all compensatory or actual damages, costs and attorneys' fees which are awarded to Plaintiffs against or agreed to as part of any settlement with any Defendant. Accordingly, the Sheriff of Cook County is maintained as an indemnification party to Count II of this complaint.

12. Defendant Cook County is empowered and directed to pay any tort judgment for compensatory damages (and associated attorneys' fees and costs) for which the Sheriff or an employee acting within the scope of his employment is found liable. Accordingly, Cook County is also maintained as an indemnification party to Count II of this Complaint.

Jurisdiction and Venue

13. This Court has jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. §§ 1331, 1343(a)(1), and

1367(a). Venue is established under 28 U.S.C. § 1391(b), because the events giving rise to these claims occurred in Cook County, Illinois, and some or all of the Defendants reside in Cook County, Illinois.

Factual Allegations[1]

Background

14. The CCDOC's main facility ("Cook County Jail") is located at 2700 South California Avenue in Chicago, Illinois. The CCDOC is organized into eleven separate Divisions, housing approximately 12,000 men and women. Each Division is located in a separate facility, and is under the supervision of a Divisional Superintendent. Division One is located in the oldest of the eleven facilities at CCDOC and houses approximately 1,200 male inmates.

15. Special Incarceration Unit Two ("SI-2") is located in the basement of Division One. It is one of two units that housed inmates designated as "special incarceration" inmates because they are considered to be extremely dangerous or serious escape risks as a result of having been charged in high profile criminal cases have been involved in violence while in jail, or are otherwise determined to require special incarceration treatment. SI-2 houses many of the most dangerous and difficult inmates held at Cook County Jail, and therefore is among the most dangerous and difficult places for a correctional officer to work within the jail.

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[1] All facts alleged herein pertain to the time period of 1994-2003, inclusive.

16. Plaintiff Fairley graduated from the CCDOC Training Academy on January 27, 1995. Upon graduation, he began working for the CCDOC as a correctional officer at the Cook County Jail. He was initially assigned to the midnight shift in Division One. In 1997, Plaintiff Fairley was assigned to the 7 a.m. to 3 p.m. shift in Division One.

17. Plaintiff Gackowski graduated from the CCDOC Training Academy on August 25, 1995. Upon graduation, he began working for the CCDOC as a correctional officer at the Cook County Jail. He was initially assigned to Division Five under the supervision of Defendant Andrews and others. Having witnessed repeated instances of the excessive use of force in Division Five, Gackowski sought and received a transfer to Division One. In Fall 1997, he was assigned to the 3 p.m. to 11 p.m. shift in Division One. In Fall 1998, he was assigned to the 7 a.m. to 3 p.m. shift in Division One, the same shift and division to which Plaintiff Fairley was assigned.

18. In approximately early 1999, shortly after Gackowski was assigned to the day shift in Division One, Plaintiffs Fairley and Gackowski met and became best friends. It became well known among their superiors and fellow officers in Division One that Plaintiffs Fairley and Gackowski were very close friends.

19. Over the years that they worked at the Jail, by their words and actions, Plaintiffs repeatedly made it clear to their supervisors and fellow correctional officers in Division One that they were opposed to and would neither condone nor conceal the beating and abuse of inmates, and that they would not cooperate in

any subsequent cover-ups of such incidents by other correctional officers. Plaintiffs witnessed numerous incidents of the use of excessive force on inmates, and repeatedly voiced their objections to such incidents and made it known that they would not participate in such behavior. For example:

a) Both Plaintiffs, while cadets in the Training Academy, witnessed the use of excessive force against inmates, and when they voiced objections to their training instructors, they were told not to inform on their fellow officers.

b) In December 1998, Plaintiff Fairley witnessed Defendant Coffey and another correctional officer two inmates, David Cruz and Norberto Ortiz. Plaintiff Fairley spoke against it and reported the beating to two supervisors. Defendant Byrne filed a false report about the incident and was later named along with Defendant Coffey as a defendant in a lawsuit brought by the two inmates.

c) On April 1, 2000, Plaintiff Gackowski witnessed Defendant Coffey beat up inmate Rodney Brown. Gackowski yelled at defendant Coffey to stop beating the inmate and told Defendant Coffey that his actions toward inmate Brown were uncalled for.

d) On January 15, 2000, Fairley saw Defendant Prohaska beating a shackled inmate, Earl Faber. Plaintiff Fairley yelled at Prohaska to stop. Another SI-2 inmate, Nathson Fields,

helped Faber draft a complaint which was then sent to outside correctional reform advocates, triggering an IAD investigation. Prohaska later admitted his involvement in the incident to Plaintiff Gackowski.

e) On May 9, 2000, Defendant Byrne and another correctional officer beat SI-2 inmate George Fernandez. Correctional Sgt. Arthur Perry tried to stop the beating and, later, reported this excessive force to IAD. Word quickly spread through the Division One day shift that Sgt. Perry had "ratted out" Defendant Byrne. Byrne was de-deputized, and ordered transferred out of the Division (which order was never carried out). When Sgt. Perry was subjected to a steady stream of ridicule and abuse by many Division One officers, Plaintiffs Fairley and Gackowski made it known that they admired Perry for what he did.

f) In the latter half of 2001, Plaintiffs Fairley and Gackowski both witnessed Defendant Byrne beat inmate Alpacino Lewis as Defendant Prohaska and other correctional officers watched and cheered Byrne on. Both Plaintiffs expressed their opposition to this abuse while in the presence of Defendants Byrne and Prohaska and other officers.

g) In late 2001 or early 2002, Plaintiff Gackowski witnessed Defendant Coffey and another correctional officer beat several inmates who had been fighting, while Defendants Byrne and Andrews and several

other correctional officers stood by watching. Gackowski expressed his opposition to this abuse and condonation of abuse.

h) In 2001 or 2002, Plaintiff Gackowski witnessed Defendant Fermaint and two other correctional officers beat two inmates in an area called the Post 78 pump room. Plaintiff Gackoswki refused to participate in this abuse, and walked away in disgust.

i) In late 2001 or early 2002, Defendant Byrne and Plaintiff Gackowski observed three correctional officers taking turns slapping an inmate. Defendant Byrne laughed. Plaintiff Gackowski looked at Defendant Byrne, shook his head in disgust, and left.

j) In early 2002, both Plaintiff Fairley and Gackowski witnessed Defendant Byrne repeatedly slap an inmate who was handcuffed to a pole in the Post 78 pump room. When the inmate protested, Defendant Byrne responded: "I could f***in' kill you and get away with it as long as my paperwork is straight."

k) On June 7, 2002, Plaintiff Fairley, Defendant Coffey and another correctional officer subdued and handcuffed a delusional inmate, Vennis McCall. After the inmate was restrained, Defendant Coffey and the other correctional officer beat the inmate. At the end of the shift, Defendant Coffey, in front of most of the day shift officers, bragged about their conduct. Plaintiff

Fairley then spoke up and revealed that Defendant Coffey and the other correctional officer had beaten the inmate after he was subdued.

20. On July 29, 2000, Plaintiff Fairley observed Defendants Fermaint and Bercasio, along with Officers Griffin and Bonarek, violently beating inmates Nathson Fields and others in and near the SI-2 Unit (the "SI-2 Incident"). Fields was a "jailhouse lawyer" who had helped inmate Faber expose the January 15, 2000 beating in SI-2. Plaintiff Fairley yelled at the Defendants Fermaint and Bercasio and the other correctional officers to stop beating the inmates and warned the officers that they were going to kill the inmates if they did not stop. Defendant Byrne also witnessed the beatings, heard Fairley's efforts to stop them, and urged the officers to continue.

21. On July 29, 2000, Plaintiff Gackowski was present in the Division Eight Emergency Room when some of the individuals that were injured during the SI-2 Incident were brought in for treatment. Plaintiff Gackowski observed that inmate Scott was lying listlessly on a stretcher. He saw that inmate Scott's face was swollen and bleeding.

22. Shortly after the SI-2 Incident, Plaintiff Fairley asked Defendant Byrne if he should write an Incident Report. Defendant Byrne told Plaintiff Fairley not to write a report because investigators from IAD would be taking statements from all of the individuals that were involved in the incident. As had consistently been the case with regard to all of the use of excessive force Plaintiffs Fairley and Gackowski had witnessed,

no representative from IAD ever took a statement from Plaintiff Fairley regarding the SI-2 Incident.

23. Sometime between July 29, 2000 and August 5, 2000, Plaintiff Fairley told Plaintiff Gackowski everything that Fairley had observed during the SI-2 Incident.

24. In early August 2000, Defendant Byrne told Plaintiff Gackowski that during the SI-2 incident, he (Byrne) had twisted and jumped on the leg of one of the inmates in an attempt to break it, but he could not get it to "snap." Defendant Fermaint also told Plaintiff Gackowski that he had beaten up inmate Scott. Shortly thereafter, Gackowski told Plaintiff Fairley what he (Gackowski) had been told by Defendants Byrne and Fermaint.

25. On August 16, 2000, inmates, including three of the four inmates that Plaintiff Fairley had observed being beaten and who were represented by the McArthur Justice Center of the University of Chicago Law School, filed a suit in the Law Division of the Circuit Court of Cook County, Illinois, entitled, *Fields, et al. v. Velasco, et al.*, No. 00 L 0009339 (the "*Fields* litigation"). Named as defendants in the lawsuit initially were Defendants Byrne and Fermaint, as well as CCDOC Executive Director Ernesto Velasco, Division I Superintendent James Edwards, and fifteen other officers and supervisors. Eighteen (18) of the fifty-two (52) officers and supervisors who were working the day shift in Division One on July 29, 2000 were named as defendants.

26. The *Fields* plaintiffs alleged that the beating of the SI-2 inmates on July 29, 2000 was premeditated

use of excessive force, directed by Defendant Byrne, in retribution for: the involvement of SI-2 inmates Fields and Faber in reporting the misconduct of Defendants Byrne, Prohaska and others in the beating of Faber on January 15, 2000; and the involvement of numerous SI-2 inmates in providing statements that Defendant Byrne and correctional officer Boston had beaten SI-2 inmate George Fernandez on May 9, 2000 (the beating which Sgt. Perry had attempted to stop and reported to IAD).

27. Shortly after the suit was filed, the legal team at the McArthur Justice Center received information that led them to believe that Plaintiff Fairley had witnessed the July 29, 2000 Incident as well as other incidents of excessive force, and that he might be willing to testify truthfully about these matters.

28. After the *Fields* lawsuit was filed, Plaintiffs Fairley and Gackowski made known to their fellow correctional officers that they would tell the truth if asked about what they had seen or heard regarding the SI-2 Incident. In light of their history of opposing and speaking out against the abuse of inmates, the defendants feared that plaintiffs would testify about what they knew about the many incidents of abuse at the Cook County Jail.

Defendants Harass Plaintiffs Fairley and Gackowski in an Attempt to Discourage Them from Providing Truthful Testimony in the *Fields* Litigation.

29. Following the filing of the lawsuit by the inmates injured in the July 29, 2000 SI-2 incident,

Defendants engaged in a series of deliberate and concerted actions in an effort discourage Plaintiffs Fairley and Gackowski from testifying truthfully about the many incidents of excessive force they had witnessed and were aware of at the Cook County Jail. Those actions included the following.

30. For the first months following the July 29, 2000 SI-2 incident, the correctional officers who were involved in that incident were assigned to the SI-2 Unit. Thereafter, Defendant Byrne repeatedly assigned Plaintiff Fairley to work in difficult, dangerous and stressful assignments, including in SI-2. Defendant Byrne also repeatedly ignored Plaintiff Fairley's requests to be rotated out of SI-2. Defendant Byrne's actions were also in violation of CCDOC policy.

31. Defendant Andrews was responsible for overseeing the Division One assignment and in violation of policy, took no action to ensure that Plaintiff Fairley's assignments were being rotated properly.

32. Defendants Fermaint and Bercasio harassed Plaintiff Fairley by, among other things:

a) Repeatedly refusing to allow Plaintiff Fairley to leave SI-2 in order to use the restroom;

b) Repeatedly refusing to provide Plaintiff Fairley with supplies requested by inmates, knowing that the inmates would become angered and subsequently take their anger out on Plaintiff Fairley;

c) Repeatedly swearing at Plaintiff Fairley and calling him "social worker" or "inmate lover"; and

d) Repeatedly grabbing Plaintiff Fairley from behind and imitating sexual acts upon him at roll call or during work hours.

33. On March 7, 2001, a private investigator working with the *Fields* litigation legal team went to Plaintiff Fairley's home and attempted to interview him. Plaintiff Fairley, fearful because this meant that the SI-2 inmates knew where he, his wife and young children lived, denied having any knowledge and refused to be interviewed.

34. The next day, Fairley complained to Defendant Andrews, the Division One Superintendent, that an investigator for the SI-2 inmates who were plaintiffs in the *Fields* litigation had found out where Fairley lived and tried to question him. Shortly thereafter, legal counsel to the Sheriff of Cook County issued a letter to all of the correctional officers on the day shift in Division One, informing them that their home addresses had all been turned over to the judge presiding over the *Fields* litigation, that the lawyers for the inmate-plaintiffs in the *Fields* case could contact them through the judge, and that the correctional officers had discretion whether to talk to the inmates' lawyers. The letter issued by the Sheriff's legal counsel was a widely discussed matter of concern to the correctional officers in Division One.

35. On February 25, 2002, the plaintiffs' lawyers in the *Fields* litigation issued a subpoena to Plaintiff Fairley to appear for his deposition on April 18, 2002.

The subpoena was sent to the defense lawyers representing Defendants Byrne and Fermaint and others in the *Fields* litigation and to the Legal Office at CCDOC, but was never served on Plaintiff Fairley. On information and belief, Defendants Andrews, Byrne and others became aware of the Fairley deposition subpoena shortly after CCDOC's Legal Office received it. The fact of this subpoena was concealed from Plaintiff Fairley for over nine months.

36. Thereafter, Defendant Byrne took further actions to harass and silence Plaintiff Fairley. In addition to continuing to repeatedly assign Plaintiff Fairley to SI-2 and other undesirable assignments, Defendant Byrne, among other things:

a) Improperly denied Plaintiff Fairley paternal leave after the birth of his youngest child; and

b) Improperly denied Plaintiff Fairley his requests to be paid for overtime already worked.

37. On December 9, 2002, Chief Theisen (the Chief of Division One) sent Plaintiff Fairley a written memorandum informing Plaintiff Fairley that he would be deposed in a court ordered deposition in *Fields* litigation.

38. On December 20, 2002, while Plaintiff Fairley worked in SI-2, inmate Keon Lipscomb, without provocation by Plaintiff Fairley, attacked Plaintiff Fairley with a shank, cutting him on the right wrist. Defendant Bercasio precipitated the injury by tackling the armed inmate into Plaintiff Fairley. After

inmate Lipscomb was restrained on the floor, Plaintiff Fairley witnessed Defendant Byrne kick inmate Lipscomb in the mouth.

39. Before allowing Plaintiff Fairley to go to the Emergency Room for treatment, Defendant Byrne ordered him to complete his paperwork regarding the incident. Attempting to prevent Plaintiff Fairley from truthfully reporting the incident, Defendant Byrne ordered Plaintiff Fairley not to report that there was a weapon involved in the attack. Plaintiff Fairley's reports of the incident disappeared twice, and the shank with which inmate Lipscomb cut Plaintiff Fairley was not recovered.

40. On December 23, 2002, former Defendant Timothy Kaufmann[2], a Cook County Sheriff's Police investigator, assured Plaintiff Fairley that he would investigate and write a report of the stabbing incident by inmate Lipscomb and immediately forward the report to the Inspector General's Office. Kaufmann thereafter prepared a false report, and failed to complete his investigation so that the State's Attorney's office was unable to approve charges against Lipscomb.

41. The failure by certain individual Defendants to ensure that the incident was appropriately reported, investigated and charged significantly added to Plaintiff Fairley's distress and fear for his safety. By not charging inmate Lipscomb, these individual Defendants reinforced to Plaintiff Fairley that his

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[2] Kaufmann was dismissed as a defendant in response to the filing by his counsel of a notice that he died in October 2008.

fellow officers were not going to protect him and showed other inmates that they could attack Plaintiff Fairley without fear of criminal prosecution.

42. It was known among Plaintiff Fairley's supervisors and fellow officers that his deposition was rescheduled for January 17, 2003, and that once he was deposed, Plaintiff Gackowski's deposition would likely follow. As this date approached, the harassment and threats intensified in an attempt to silence Plaintiffs Fairley and Gackowski. From Fall 2002 until January 2003, Plaintiff Fairley was threatened on more than one occasion by certain Individual Defendants, including, but not limited to:

a) Defendant Coffey who warned Plaintiff Fairley in or about October or November of 2002 that officers who tell on other officers "usually get met in the parking lot";

b) Defendant Bercasio who warned Plaintiff Fairley on or about December 28, 2002 that he should not "fuck with people" because that is how you get stabbed;

c) Defendant Byrne who warned Plaintiff Fairley not to testify by telling him in late December 2002 that inmate Lipscomb would *falsely* state that Plaintiff Fairley beat him (inmate Lipscomb); and

d) Defendant Prohaska who threatened the lives of Plaintiffs Fairley and Gackowski on January 7, 2003. (*See infra* at ¶ 50)

43. In furtherance of the campaign of harassment aimed at discouraging Plaintiffs Fairley and Gackowski from testifying, on January 6, 2003, Defendant Byrne ignored Plaintiff Fairley's request for back-up help for him and Plaintiff Gackowski when a large group of inmates in the recreation room began acting in a manner that suggested a fight was imminent. Defendant Byrne told Plaintiff Fairley to let the inmates fight, a situation that would have placed Plaintiffs Fairley and Gackowski in grave danger.

44. Beginning in or about mid to late 2000, Defendants Fermaint and Bercasio began engaging in a wide-ranging campaign of harassment against Plaintiff Gackowski. The harassment included, but was not limited to:

a) Repeatedly drawing, posting and circulating cartoons and pictures depicting Plaintiff Gackowski in a sexually humiliating manner;

b) Repeatedly grabbing Plaintiff Gackowski from behind and imitating sexual acts upon him at roll call or during work hours;

c) Repeatedly making derogatory sexual comments about Plaintiff Gackowski's wife; and

d) Repeatedly swearing at Plaintiff Gackowski, calling him "social worker" or "inmate lover," and making derogatory sexual comments, such as "seal boy, come here and blow my horn."

45. On June 18, 2002, Plaintiff Gackowski filed a written complaint with the IAD regarding the harassment he was experiencing. On July 9, 2002, Plaintiff Gackowski filed another written complaint with IAD regarding the continual harassment by certain individual Defendants. Even though Defendant Andrews was one of the subjects of Plaintiff Gackowski's IAD complaints and IAD investigations were to be confidential, Defendant Weinstein sent Gackowski's complaint to Defendant Andrews. Defendant Andrews shared Plaintiff Gackowski's complaint with Defendant Byrne, and alerted all of the other officers involved in Gackowski's complaint that Plaintiff Gackowski had filed complaints against them. Defendants Andrews and Byrne then berated and threatened Plaintiff Gackowski for filing these complaints, including a threat by Defendant Andrews to sue him for slander. Thereafter Gackowski was involuntarily transferred to an undesirable assignment outside of Division One.

46. Defendant Weinstein, the Chief Investigator of IAD, was responsible for ensuring a prompt, effective and fair investigation of these complaints. Instead, he and IAD Investigator Gregory Ernst stalled the investigation for months. While in Division 5, Plaintiff Gackowski had witnessed Ernst and other correctional officers engage in the brutal beating of as many as 70 inmates. Ernst was the IAD investigator assigned to the case. He failed to interview any witnesses until January 15, 2003, seven months after Plaintiff Gackowski filed his first complaint with IAD, and five days after Plaintiff Gackowski reported Defendant Prohaska's death threat (*see infra* ¶ 60).

47. From Fall 2002 until his resignation, Plaintiff Gackowski suffered further harassment and adverse employment actions including, but not limited to, frequent harassing phone calls from Defendants Fermaint and Bercasio and other officers.

48. On January 7, 2003, Defendant Prohaska made death threats to Plaintiff Gackowski about both Plaintiff Gackowski and Plaintiff Fairley. Defendant Prohaska told Plaintiff Gackowski that they always knew Plaintiff Fairley was a weak link in the chain and that they were going to "bury the weak link." He then told Plaintiff Gackowski that he was "no better." Plaintiff Gackowski immediately informed Plaintiff Fairley about these threats, and they both concluded that it was no longer safe to work in Division One.

49. On January 9, 2003, Plaintiff Gackowski provided two written Memoranda to IAD Investigator Ernst, detailing the harassment and threats that he had experienced since November 2002. In these memoranda, Plaintiff Gackowski wrote that he believed that it was no longer safe to work in Division One and that he was in fear for his and his family's safety.

50. On January 10, 2003, Plaintiff Gackowski met with IAD Chief Frank Diaz, Investigator Ernst and two Sheriff's Police officers, Investigator Kenneth Raher, and Sgt. Ronald Zychowski, for the purposes of pressing formal charges against Defendant Prohaska by signing a Cook County Sheriff's Police report and making a formal recorded statement regarding the threat made by Defendant Prohaska. At this meeting, Plaintiff Gackowski was prohibited from pressing formal charges or making a formal recorded statement.

51. Fearing for their lives, beginning January 11, 2003, Plaintiffs Fairley and Gackowski used the remainder of his sick time and days off and did not report to work until he resigned.

52. On January 15, 2003, Fairley, with the assistance of private counsel, prepared a written statement regarding the event he witnessed during the SI-2 Incident. Also on that day, Fairley and his counsel met with counsel for the defendants in the *Fields* litigation. After the close of business that same day, the Sheriff's Inspector General, Henry Barsch, conducted the first interview regarding the SI-2 Incident which had taken place 2 ½ years earlier.

53. On January 17, 2003, Fairley began his deposition testimony in the *Fields* litigation. During the course of his deposition, he testified about, among other things, the Cruz and Ortiz incidents, the Fernandez incident, the July 29 incident in SI-2, and the Alpacino Lewis incident. He also indicated that he had shared all this information with Plaintiff Gackowski.

54. On January 30, 2003, plaintiffs' counsel in the *Fields* litigation sent out notice for the deposition of Plaintiff Gackowski. At his deposition on February 18, 2003, Gackowski testified about multiple instances of the excessive use of force he had witnessed in Divisions Five and One.

Plaintiffs Resign as a Result of Defendants' Ongoing Campaign of Harassment.

55. As a result of the Defendants' harassment campaign in an attempt to silence Plaintiff Fairley, in

Fall 2002, Plaintiff Fairley suffered from chest pains and was hospitalized and diagnosed with acute stress. Plaintiff Fairley's severe stress not only resulted in chest pains and hospitalization, but also loss of sleep, loss of appetite, weight loss, exhaustion, and repeated headaches.

56. As a result of the Defendants' harassment campaign in an attempt to silence Plaintiff Gackowski, he has experienced severe stress resulting in sleep deprivation and repeated headaches.

57. On the morning of February 3, 2003, Plaintiffs Fairley and Gackowski, with their attorney, arrived at the IAD Office in Division Five and filed written emergency transfer requests. Plaintiffs spoke to IAD Chief Diaz, who assured them that he would immediately deliver the requests to Acting Executive Director John Maul. Diaz also assured Plaintiffs that they would have a response from Acting Executive Director Maul no later than the close of business on February 3, 2003.

58. Neither Acting Executive Director Maul, nor any other representative of the CCDOC, contacted the Plaintiffs on February 3 or 4, 2003 regarding their emergency transfer requests. Seeking a response regarding their emergency transfer requests, Plaintiffs Fairley and Gackowski went to Diaz's office in the late afternoon of February 4, 2003. They were told by Diaz that their emergency transfer requests had not been given to Maul, but were instead diverted to the Legal Office at CCDOC. Because their emergency transfer requests had not been granted and in fear of their safety, Plaintiffs Fairley and Gackowski were compelled to submit their resignations.

Legal Claims

Count I: Deprivation of First Amendment Rights Under § 1983 (PRIOR RESTRAINT)

59. Paragraphs 1-58 are hereby restated and re-alleged as paragraphs 1-58 of CountOne.

60. Plaintiffs Fairley and Gackowski had a right pursuant to the First and Fourteenth Amendments of the United States Constitution to testify truthfully about the use of excessive force at the Cook County Jail.

61. The Defendants, acting under color of state law and without legitimate justification, intentionally engaged in a campaign of harassment deliberately aimed at silencing the Plaintiffs and discouraging them from testifying.

62. Through this campaign of harassment, Plaintiffs were chilled from speaking out on matters of public concern in violation of their First and Fourteenth Amendment rights, and were put in fear for their lives and physical safety to the point of their constructive discharge.

WHEREFORE, Plaintiffs request the following relief:

a) Judgment for compensatory damages, and for Plaintiff Gackowski only back pay, jointly and severally against the Defendants;

b) Judgment for punitive or exemplary damages, against each of the Defendants in their individual capacities;

c) Under 42 U.S.C. § 1988, an award of the costs of this action, including reasonable attorneys' fees, jointly and severally against the Defendants; and

d) Such other and further relief that to this Court may seem just and equitable.

Count II: Indemnification
(Against the Sheriff of Cook County and Cook County)

63. Paragraphs 1-62 are hereby re-alleged as paragraphs 1-62 of Count Two.

64. Pursuant to a stipulation entered herein by Defendant Sheriff, and on order of court entered on September 24, 2007, Defendant Sheriff of Cook County is liable for any judgment entered against the Defendants for compensatory damages and for the associated attorneys' fees and costs.

65. Pursuant to 745 ILCS 10/9-102, 55 ILCS 5/4-6003 and 55 ILCS 5/5-1106, Defendant Cook County is empowered and directed to pay any tort judgment for compensatory damages (and associated attorneys' fees and costs) for which an independently elected Cook County officer such as Defendant Sheriff of Cook County or his deputies acting within the scope of their employment is found liable. Defendant Cook County is liable for any judgment entered against the individual Defendants and Defendant Sheriff of Cook

County for compensatory damages and for the associated attorneys' fees and costs. The acts of the Defendants in Count I were committed within the scope of their employment. In the event a judgment for compensatory damages is entered against the Defendants, Defendant Cook County must pay the judgment, as well as the associated attorneys' fees and costs.

WHEREFORE, Plaintiffs request the following relief: Judgment jointly and severally against the Sheriff of Cook County and pursuant to 745 ILCS 10/9-102, 55 ILCS 5/4-6003 and 55 ILCS 5/5-1106 against Defendant Cook County; and such other and further relief that to this Court may seem just and equitable.

Jury Trial Demanded

Plaintiffs demand a trial by jury.

Dated: February 22, 2010

Respectfully submitted,

/s/ Matthew J. Piers
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APPENDIX 2

(Rev. 7/23/01) CCL 0065 NO. 1002

CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION
LAW RECORD
DOROTHY BROWN
CLERK

JUDGE IRWIN SOLGANICK #239 JUNE 3, 2005

00L9339
01L9023
02L14917

NATHSON FIELDS, ET.AL.
vs.
EDWARD BYRNE, ET. AL.

VERDICT FORM B

We, the jury find for all of the DEFENDANTS and against all the plaintiffs.

Judgment entered on the Verdict.

Microfilm #000501101